

ISRAEL MORALES
H-88164 Facility 1-4-122
C.S.P. - Solano State Prison
Post Office Box 4000
Vacaville, California 95696-4000

Petitioner IN PRO SE
ISRAEL MORALES

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U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ISRAEL MORALES,

Petitioner,

vs.

D.K. SISTO, Warden,

a person having custody
of petitioner,

Respondent.

Case No.

C 07-06002 TEH(PR)

MOTION TO VACATE
JUDGMENT; DECLARATION
OF ISRAEL MORALES, IN
SUPPORT THEREOF

[28 U.S.C. § 1746]

Pursuant to Federal Rules of Civil Procedure, Rule 60(b)(1), the above-named petitioner, ISRAEL MORALES, hereby moves this court for an order to vacate the judgment entered on July 7, 2007, dismissing the above-entitled matter without prejudice. (See ORDER OF DISMISSAL [hereinafter "Order"], July 7, 2007.)

IN SUPPORT THEREOF, I, ISRAEL MORALES, hereby declare under penalty of perjury as follows:

1. That I am the petitioner in the aforesaid cause of action, proceeding without the appointment of counsel. I am over the age of 18 years and have personal knowledge of the facts set forth

below, and if called to testify, I could and would competently testify as to such facts.

2. That on November 6, 2007, the inmate who is and has been assisting me with all of my legal papers and submission of same, Marcos Rogelio Juarez ("Juarez"), mailed the federal habeas petition to this court. (See Exhibit A.) I do not understand the law and have a limited education. Without assistance from a fellow inmate with some knowledge in the law, I could not exercise my right of access to the courts.

3. That on or about the beginning of December 2007, I received a "conformed" copy from the Court indicating my petition had been filed on November 28, 2007, and assigned case number CV 07-06002 TEH(PR). (See Exhibit B.) Said conformed copy was delivered to me at Solano State Prison ("Solano), Facility I, Building and Cell Number: 4-122.

4. That I am housed on Facility I at Solano, whereas Inmate Juarez is housed on Facility II at said institution. Approximately six months after Juarez mailed the petition to this court, I wrote and asked him if we should contact the court because I had not received further pleadings. Inmate Juarez explained that the court would contact us once it determined what course of action to pursue. Juarez added that due to the large number of petitions submitted to the federal courts, requesting the status of a pending matter is usually not answered.

5. That on the evening of July 10, 2008, I received the Court's order dismissing the above-named matter without prejudice. The legal papers were delivered to me at my Building and cell

number: 4-122. The Order stated that "[O]n June 13, 2008, the Court entered an order directing Petitioner to provide the Court with a current address within twenty days of the filing date of the order, or face dismissal of the petition. On July 1, 2008, a copy of the order addressed to Petitioner was returned to the Court as undeliverable." (See Order, July 7, 2008.) As a result thereof, the Court dismissed the petition without prejudice.

6. That on July 11, 2008, I sent Inmate Juarez the Order asking for his assistance. I also explained that I had not moved from my present location since the beginning of 2006. Inmate Juarez contacted me and explained he would prepare the attached Motion to Vacate Judgment, accompanying Memorandum of Points and Authorities, and this declaration, advising the Court of the circumstances herein described.

7. That my current address is as follows:

Israel Morales (aka Armando Hidalgo)
Solano State Prison, H-88164 1-4-122
Post Office Box 4000
Vacaville, California 95696-4000

8. That I do not understand why the institution failed to deliver the June 13, 2008 order and instead, returned said document to the Court as "undeliverable." The only possible explanation is that I am imprisoned under a different name, i.e., Armando Hidalgo. However, the prison identification number: H-88164, is correct. Most puzzling is the fact that not only did I receive the "conformed" copy (Exhibit B) from the Clerk of the Court under the name of Israel Morales, but also the Order of Dismissal. Therefore, I should have received the June 13

order.

9. That Inmate Juarez also prepared the accompanying In Forma Pauperis application which I have signed and submitted along with the pleadings represented in paragraph six above.

10. That for the foregoing reasons, I respectfully petition this Court to vacate its order entered on July 7, 2008, dismissing the federal habeas application without prejudice (Case No. C 07-06002 TEH(PR)), inasmuch as I was not given proper notice nor the opportunity to provide the Court with the information and pleadings requested.

11. That Inmate Juarez prepared the Motion to Vacate Judgment, the accompanying Memorandum of Points and Authorities, and this declaration. He sent me the foregoing along with a written explanation and purpose of the pleadings.

I declare under penalty of perjury, under the laws of the United States of America, that the foregoing is true and correct, except for statements made on information and belief, and as to such latter statements, I believe them to be true and correct.

Executed on July 17, 2008, at Solano State Prison, Vacaville, California.

Israel Morales

ISRAEL MORALES
Petitioner/Declarant

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I S R A E L M O R A L E S
H-88164 Facility 1-4-122
C.S.P. - Solano State Prison
Post Office Box 4000
Vacaville, California 95696-4000

Petitioner IN PRO SE
ISRAEL MORALES

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ISRAEL MORALES,

Petitioner,

vs.

D.K. SISTO, Warden,

a person having custody
of petitioner,

Respondent.

Case No.
C 07-06002 TEH(PR)

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
OF MOTION TO VACATE
JUDGMENT

I N T R O D U C T I O N

Petitioner, with the assistance of a fellow inmate, filed a pro se federal habeas in this Court. Shortly thereafter, Petitioner received a "conformed" copy certifying that Petitioner's federal writ was filed on November 28, 2007, assigning it case number C -7-06602 TEH(PR).

On July 10, 2008, Petitioner received the Order of Dismissal ("Order") from the Court dismissing the instant matter without prejudice for failure to prosecute and failure to comply with Local Rule 3-11. The Order also stated that Petitioner failed

to obey the Court's Order of June 13, 2008, in which the Court directed Petitioner to provide the Court with a current address within twenty days or face dismissal of the petition. On July 1, 2008, a copy of the order addressed to Petitioner was returned to the Court as undeliverable. (See e.g., Order.)

As argued herein, the order entered on July 7, 2008, dismissing the petition, should be vacated.

A R G U M E N T

I. RELIEF FROM JUDGMENT OR ORDER

Rule 60 of the Federal Rules of Civil Procedure, permits a judgment or order to be corrected or vacated under certain circumstances. This rule does not provide a substitute for an appeal. (Eutectic Corp. v. Metco, Inc., 597 F.2d 32, 24 (2d. Cir. 1979); Fackelman v. Bell, 564 F.2d 734, 735 (5th Cir. 1977).)

One part of the rule provides that clerical errors in judgments, orders, or other parts of the record, and errors arising from oversight or omissions, may be corrected at any time. (Federal Rules of Civil Procedure ["Fed.R.Civ.Pro."], Rule 60(a).)

This part of the Rule is construed very strictly and may not be used to correct errors involving the substance of the case. (Sanchez v. City of Santa Ana, 936 F.2d 1027, 1033 (9th Cir. 1990), cert. denied, 112 S.Ct. 417 (1991) (rule may not be used to correct substantive errors of law); Bershad v. McDonough, 469 F.2d 1333, 1339 (7th Cir. 1972 (rule "applies only to an error of transcription, copying, or calculation, and not to a fundamental failure of discovery or notification").)

Moreover, a party may obtain relief from a judgment within one year on a showing of "mistake, inadvertence, surprise, or excusable neglect, newly discovered evidence, or fraud, misrepresentation" or other misconduct by an adverse party. (Fed.R.Civ.Pro., Rule 60(b)(1).) This provision has been applied to pro se litigants who do not receive actual notice of a judgment against them, or who are confused or misinformed about legal procedures. (Wallace v. McManus 776 F.2d 915, 917 (10th Cir. 1985); see also Marshall v. Monroe & Sons, Inc., 615 F.2d 1156, 1160 (6th Cir. 1980) (relief granted to pro se litigant based on his misunderstanding of procedures).)

Within a "reasonable time" after a judgment, a party may obtain relief from a judgment which is void, which has been satisfied or which, for some reason, should not continue to be effective, or for "any other reason justifying relief from the operation of the judgment." (See, Fed.R.Civ.Pro., Rules 60(b)(4), 60(b)(5), 60(b)(6); Klapprott v. United States, 335 U.S. 601, 613-14, (1949) (civil defendant who was ill, penniless and incarcerated, and therefore unable to appear and defend his case, granted relief), modified, 336 U.S. 942 (1950).)

In the case now before this Court, the Order provides sufficient evidence that Petitioner was not notified of the Court's direction to submit his address within twenty days or face dismissal. (See Declaration of Israel Morales, In Support.) Indeed, the Order clearly states that on "July 1, 2008, a copy of the order addressed to Petitioner was returned to the Court as undeliverable." (Order, July 7, 2008; emphasis added.) Thus,

Petitioner could not comply with the Court's direction because he never received the notice from the Court.

As established in the attached declaration, the Court has sent, and Petitioner has received, the conformed copy showing his federal petition was filed on November 28, 2007, with the corresponding case number, and, the Court's Order of Dismissal dated July 7, 2008. Both pleadings were mailed to Petitioner who has not moved from his present location, Solano State Prison, Facility I, Building and Cell Number: 4-122, since 2006. Consequently, there is no reason why the institution failed to properly deliver Petitioner's legal mail in a timely manner.

Accordingly, Petitioner respectfully moves this Court for an order vacating its July 7, 2008 judgment dismissing the habeas petition, case number C 07-06002 TEH(PR).

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C O N C L U S I O N

For the foregoing reasons, consistent with these Points and Authorities, this Court should grant Petitioner's motion and vacate its order entered on July 7, 2008, and grant relief from the operation of the judgment.

Dated: July 16, 2008

Respectfully submitted,

by: Israel Morales
ISRAEL MORALES
Petitioner In Pro Se

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Exhibit A

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Name MORALES ISRAEL
(Last) (First) (Initial)

Prisoner Number H-88164

Institutional Address SOLANO - P.O. Box 4000
VACAVILLE, CALIF. 95696-4000

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ISRAEL MORALES
(Enter the full name of plaintiff in this action.)

vs.

D.K. SISTO, WARDEN

(Enter the full name of respondent(s) or jailor in this action)

CV 07

6002

Case No. _____
(To be provided by the clerk of court)

**PETITION FOR A WRIT
OF HABEAS CORPUS**

E-filing

(PR)

Read Comments Carefully Before Filling In

When and Where to File

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b).

**Declaration of
Service by Mail
[28 U.S.C. § 1746]**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ISRAEL MORALES,)	Case No.
)	C 07-06002 TEH(PR)
Petitioner,)	
)	
vs.)	DECLARATION OF
)	SERVICE BY MAIL
D.K. SISTO, Warden,)	
)	
a person having custody)	
of petitioner,)	
)	
Respondent.)	[28 U.S.C. § 1746]

I, ISRAEL MORALES, am a resident of the state of California, county of Solano. I am over the age of 18 years and the Petitioner in the above-entitled matter. My prison address is: Solano State Prison, Post Office Box 4000, Vacaville, California 95696-4000. My prison identification number is: H-88164.

On July 17, 2008, I served the foregoing: Motion to Vacate Judgment; Declaration of Israel Morales, In Support Thereof [28 U.S.C. § 1746], on the Court named below, by placing the original and one true and correct copy thereof, in a sealed envelope with postage fully paid thereon, and delivering said envelope and above-described legal papers to a duly authorized California Corrections Officer, as prescribed and so provided for the deposit of legal mail in the United States Mail at Solano State Prison.

United States District Court
Northern District of California
Attn: Office of the Clerk
450 Golden Gate Avenue
San Francisco, California 94102

I declare under penalty of perjury, under the laws of the United States, that the foregoing is true and correct, and that this declaration was executed at Solano State Prison, in Vacaville, California.

Israel Morales
ISRAEL MORALES
Petitioner/Declarant

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

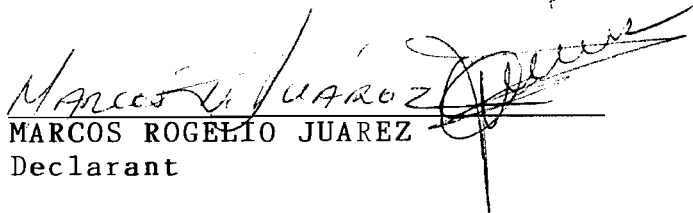
ISRAEL MORALES,)	Case No.
)	
Petitioner,)	
)	
vs.)	
)	DECLARATION OF
D.K. SISTO, Warden,)	SERVICE BY MAIL
)	
a person having custody)	
of petitioner,)	
)	
Respondent.)	[28 U.S.C. § 1746]

I, MARCOS ROGELIO JUAREZ, am a resident of the state of California, county of Solano. I am over the age of 18 years and not a party to the above-entitled matter. My prison address is: Solano State Prison, Post Office Box 4000, Vacaville, California 95696-4000. My prison identification is: C.D.C. No. J-91449.

On November 6, 2007, I served the foregoing: Petition for Writ of Habeas Corpus, Brief and Exhibits In Support Thereof, on the United States District Court named below, by placing the original and one true and correct copy thereof, in a sealed envelope with postage fully paid thereon, and delivering said envelope and above-described legal papers to a duly authorized California Corrections Officer, as prescribed and so provided for the deposit of legal mail in the United States Mail at Solano State Prison.

United States District Court
San Jose Office
Attn: Office of the Clerk
280 S. First Street, No. 2112
San Jose, California 95113-3008

I declare under penalty of perjury, under the laws of the state of California, that the foregoing is true and correct, and that this declaration was executed at Solano State Prison, in Vacaville, California.



 MARCOS ROGELIO JUAREZ
 Declarant

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Exhibit B

I S R A E L M O R A L E S
'In Propria Persona'
H-88164 Facility 1-4-122
C.S.P. - Solano State Prison
Post Office Box 4000
Vacaville, California 95696-4000

July 16, 2008

United States District Court
Northern District of California
Attn: Office of the Clerk
450 Golden Gate Avenue
San Francisco, California 94102

RE: Israel Morales vs. D.K. Sisto, Warden
Case No. C 07-06002 TEH(PR)

Dear Sir/Madam:

Enclosed please find the following pleadings: Motion to Vacate Judgment; Declaration of Israel Morales, In Support Thereof [28 U.S.C. § 1746], and a Northern District IN FORMA PAUPERIS Form.

Please calendar the aforementioned at the court's earliest convenience. Included is a S.A.S.E. for a "conformed" copy of the face sheets to be returned for my records.

I thank you in advance for your anticipated assistance in the matters and requests herein articulated.

As always, . . .

Respectfully,

Israel Morales
ISRAEL MORALES
Petitioner In Pro Se

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Plaintiff,

v.

Defendant.

CASE NO.

PRISONER'S
IN FORMA PAUPERIS
APPLICATION

I, Israel Morales . aka Hidalgo, declare under penalty of perjury that I am the plaintiff in the above entitled case and that the information I offer throughout this application is true and correct. I offer this application in support of my request to proceed without being required to prepay the full amount of fees, costs or give security. I state that because of my poverty I am unable to pay the costs of this action or give security, and that I believe that I am entitled to relief.

In support of this application, I provide the following information:

1. Are you presently employed? Yes _____ No ✓

If your answer is "yes," state both your gross and net salary or wages per month, and give the name and address of your employer:

Gross: _____ Net: _____

Employer: _____

If the answer is "no," state the date of last employment and the amount of the gross and net salary and wages per month which you received. (If you are imprisoned, specify the last place of employment prior to imprisonment.)

I am actually in school and I don't have a salary.
for the last 5 years.

2. Have you received, within the past twelve (12) months, any money from any of the following sources:

- | | | |
|-----------------------------------------------------------------------------------|-----------|-------------|
| a. Business, Profession or self employment | Yes _____ | No <u>✓</u> |
| b. Income from stocks, bonds, or royalties? | Yes _____ | No <u>✓</u> |
| c. Rent payments? | Yes _____ | No <u>✓</u> |
| d. Pensions, annuities, or life insurance payments? | Yes _____ | No <u>✓</u> |
| e. Federal or State welfare payments, Social Security or other government source? | Yes _____ | No <u>✓</u> |

If the answer is "yes" to any of the above, describe each source of money and state the amount received from each.

3. Are you married? Yes _____ No ✓

Spouse's Full Name: _____

Spouse's Place of Employment: _____

Spouse's Monthly Salary, Wages or Income: _____

Gross \$ _____ Net \$ _____

4. a. List amount you contribute to your spouse's support:

\$ _____

b. List the persons other than your spouse who are dependent upon you for support and indicate how much you contribute toward their support:

5. Do you own or are you buying a home? Yes _____ No ✓

Estimated Market Value: \$ _____ Amount of Mortgage: \$ _____

6. Do you own an automobile? Yes _____ No ✓

Make _____ Year _____ Model _____

Is it financed? Yes _____ No _____ If so, Total due: \$ _____

Monthly Payment: \$ _____

7. Do you have a bank account? (If you are a prisoner, include funds in your prison account, and provide the certificate attached, signed by an officer of the prison.)

Yes _____ No

Name(s) and address(es) of bank: _____

Present balance(s): \$ _____

Do you own any cash? Yes _____ No _____ Amount: \$ _____

Do you have any other assets? (If "yes," provide a description of each asset and its estimated market value.) Yes _____ No

8. What are your monthly expenses?

Rent: \$ _____ Utilities: _____

Food: \$ _____ Clothing: _____

Charge Accounts:

<u>Name of Account</u>	<u>Monthly Payment</u>	<u>Total Owed On This Account</u>
_____	\$ _____	\$ _____
_____	\$ _____	\$ _____

9. Do you have any other debts? (List current obligations, indicating amounts and to whom they are payable.)

I consent to prison officials withdrawing from my trust account and paying to the court the initial partial filing fee and all installment payments required by the court.

I declare under the penalty of perjury that the foregoing is true and correct and understand that a false statement herein may result in the dismissal of my claims.

7-17-08

DATE

Israel Morales aka Armando Hidalgo

SIGNATURE OF APPLICANT